

Before the  
Federal Communications Commission  
Washington, D.C. 20554

~~NOT FOR PUBLIC RELEASE~~

In the Matter of	)	
	)	
Amendment of Section 1.17 of the	)	GC Docket No. 02-37
Commission's Rules Concerning Truthful	)	
Statements to the Commission	)	
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	)	
	)	
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### REPORT AND ORDER

**Adopted:** March 4, 2003

**Released:** March 10, 2003

By the Commission:

1. **By** this report and order, we modify section 1.17 of our Rules, 47 C.F.R. § 1.17, which specifies the requirements for the submission of truthful statements to the Commission. The new rule is a clearer, more comprehensive, and more focused articulation of the standards for truthful statements than the old rule. The new rule will also enhance the effectiveness of our enforcement efforts.

2. The new rule broadens the category of persons subject to the rule by applying the requirement to: (1) any holder of any Commission authorization, whether by application or by blanket authorization or other rule; (2) any person performing without Commission authorization an activity that requires Commission authorization; (3) any person that has received a citation or a letter of inquiry from the Commission or its staff, or is otherwise the subject of a Commission or staff investigation, including an informal investigation; **(4)** in a proceeding to amend the FM or Television Table of Allotments, any person filing an expression of interest, and (5) to the extent not already covered above, any cable operator or common carrier. The former rule applied only to applicants and radio licensees and permittees. The amended rule applies **to** investigatory and adjudicatory matters and to tariff proceedings, but not to general rulemaking proceedings or declaratory ruling proceedings. The new rule prohibits written **and** oral statements of fact that are intentionally incorrect or misleading and written statements that are made without a reasonable basis for believing that the statement is correct and not misleading. The former rule, which applied only to written submissions, was less precise in defining the standard of care required.

### I. BACKGROUND

3. Currently, section 1.17 of the Commission's rules provides:

**1.17 Truthful written statements and responses to Commission inquiries and correspondence**

The Commission or its representatives may, in writing, require from any applicant, permittee or licensee written statements ~~of~~ fact relevant to a determination whether an application should be granted or denied, or ~~to~~ a determination whether a license should be revoked, or to some other matter within the jurisdiction of the Commission. No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

A note to the rule also states that the rule covers only written submissions.<sup>1</sup>

4. In our notice of proposed rulemaking,<sup>2</sup> we found that although the vast majority of persons dealing with the Commission understand their obligation to take the appropriate steps to ensure that the information they submit is accurate, the scope of the current section 1.17 as written might reflect an unduly narrow articulation of the obligations of persons dealing with the Commission. We were concerned that this might hamper our ability to take enforcement action in those cases where persons dealing with the Commission do not exercise the requisite care to ensure that they submit accurate information. NPRM at ¶ 3. Accordingly, we proposed to revise section 1.17 to provide that the rule would prohibit incorrect statements or omissions that are the result of negligence, as well as an intent to deceive. We also wished to make clear that the **rule** would cover statements made to the Commission in all contexts, and not just in circumstances in which the Commission has requested information. Finally, we proposed to broaden the **rule's** scope to include oral statements and not just written statements, and to apply the rule to all persons making statements to the Commission, including non-regulatees. The proposed rule provided as follows:

**§ 1.17 Truthful and accurate statements to the Commission**

(a) The Commission or its representatives may, in writing, require written statements **of** fact relevant to the determination of any

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<sup>1</sup> The note to the rule provides as follows:

Note: Section 1.17 is limited in application to written matter. It implies no change in the Commission's existing policies respecting the obligation of applicants, permittees and licensees in all instances to respond truthfully to requests for information deemed necessary to the proper execution of the Commission's functions.

<sup>2</sup> Amendment of Section 1.17 of the Commission's Rules, 17 FCC Rcd 3296 (2002) (NPRM)

matter within the jurisdiction of the Commission

(b) No person shall, in any written or oral statement of fact submitted to the Commission, intentionally or negligently provide incorrect material information or intentionally or negligently omit any material information hearing on any matter within the jurisdiction of the Commission.

## II. DISCUSSION

5. We received comments and reply comments from several sources, including the Federal Communications Bar Association.<sup>3</sup> The comments have been very helpful to us in clarifying the appropriate scope of the rule. The amended rule will apply to investigatory and adjudicatory matters and to tariff proceedings. The amended rule will not apply to comments submitted in general rulemakings or to declaratory ruling proceedings. In addition, it will apply only to Commission regulatees, as defined by the rule, and not to all persons. Further, it will apply to intentionally incorrect or misleading factual statements that are either oral or written and to written statements that are made without a reasonable basis to believe that they are materially correct and not misleading. Specifically, the new rule provides:

### **\$1.17 'Truthful and accurate statements to the Commission'**

(a) In any investigatory or adjudicatory matter within the Commission's jurisdiction (including, but not limited to, any informal adjudication or informal investigation but excluding any declaratory ruling proceeding) and in any proceeding to amend the FM or Television Table of Allotments (with respect to expressions of interest) or any tariff proceeding, no person subject to this rule shall:

(1) in any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

(2) in any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.

<sup>3</sup> We received comments from: (1) The Federal Communications Bar Association, (2) James A. Kay, Jr. (Kay), (3) Nickolaus E. Leggett (Leggett), (4) The Minority Media and Telecommunications Council (Minority Media), and (5) The Verizon Telephone Companies (Verizon). We received reply comments from: (1) The Office of the [Texas] Public Utilities Counsel (OPUC) and (2) The Association of Federal Communications Consulting Engineers (AFCCC).

(b) For purpose of paragraph (a), “persons subject to this rule” shall mean the following:

- (1) any applicant for any Commission authorization;
- (2) any holder of any Commission authorization, whether by application or by blanket authorization or other rule;
- (3) any person performing without Commission authorization an activity that requires Commission authorization;
- (4) any person that has received a citation or a letter **of** inquiry from the Commission or its staff, or is otherwise the subject of a Commission or staff investigation, including an informal investigation;
- (5) in a proceeding to amend the FM or Television Table of Allotments, any person filing an expression of interest; and
- (6) to the extent not already covered above, any cable operator or common carrier.

As discussed below, these changes achieve, in a manner that fully responds to the issues raised by the commenters, our objective of codifying an appropriate standard of care regarding submissions of information to the Commission and ensuring that we may take appropriate enforcement action when regulatees submit incorrect or misleading information to the Commission. The new rule improves upon the old rule by making clear that its obligations extend to all regulatees and not just to applicants, licensees, and permittees. The new rule also specifies in a clearer and more comprehensive manner the scope of the statements covered and the standards to which regulatees must adhere.

#### **A. SCOPE OF APPLICABLE STATEMENTS**

6. At the outset, several comments point out that the language in the proposed rule indicating that persons shall not omit “any material information bearing on any matter within the jurisdiction of the Commission” seems overbroad. Even though this language is identical to that in the current rule, it fails to specify clearly the context in which the requirement applies. The FCBA contends that this language would literally require parties to disclose information whether or not relevant to matters before the Commission or where the parties had a legitimate reason not to disclose information. Similarly, Verizon believes that the proposed rule does not provide fair notice as to the amount of information that would have to be supplied to avoid a violation for material omission. AFCCE also asserts that the language is overbroad.

7. We did not, by this language, or otherwise, intend to create arbitrary constraints on what parties could say – or not say – in their pleadings. Accordingly, we wish to clarify that our reference to “materiality” and “Commission jurisdiction” was intended only to indicate that the

representations and omissions we are concerned about are those material<sup>4</sup> to the issues before the Commission and that we do not intend the rule to apply to representations or omissions that are insignificant or extraneous to the issues. We therefore will modify the language of the rule to better clarify its intended scope

## B. STANDARD OF CARE AND APPLICABLE PROCEEDINGS

8. Several commenters also took issue with our proposal to adopt a negligence standard. The FCBA asserts that a “negligence” standard would be vague and would impose an unfair burden on participants in Commission proceedings. In the FCBA’s view, the Commission could adequately clarify current policy by prohibiting “willful,” “knowing,” or “reckless” false statements and omissions. Alternatively, the Commission could expand current policy by adopting a formula such as “without reasonable belief in the truthfulness or completeness” of a representation. Minority Media contends that the proposed standard is unnecessarily broad in that no showing has been made of a need to apply sanctions to submissions that are not abusive. Verizon criticizes the proposal to include inadvertent misstatements within the scope of the rule and takes particular exception to applying the rule to omissions. In Verizon’s view, such an approach would hamper the ability of people making submissions to the Commission to freely fashion their arguments, in violation of the First Amendment, and would have an especially chilling effect on people communicating with the Commission informally. According to Verizon, they would have to artificially qualify their arguments or remain silent. Verizon argues that the proposed rule would lead people to flyspeck their opponents’ submissions to harass them with allegations that they violated the rule. Leggett argues that the concept of negligence should not be applied to rulemakings. He maintains that it is extremely difficult to define negligence in the context of rulemakings because the policy judgments at issue involve differences in values, priorities, and political opinions. Thus, according to Leggett, real and honest differences in philosophy may produce differing perceptions of the facts relevant to policy determinations. Kay and AFCCE also object to the negligence standard. OPUC does not believe that the negligence standard is vague or overbroad and considers the other parties’ First Amendment arguments overstated. OPUC does, however, have concerns about applying a negligence standard to rulemakings and omissions.

9. These comments have been helpful in delineating the appropriate standard that we should adopt and the appropriate contexts in which any standard should be applied. Our historical definition of misrepresentation and lack of candor specified an actual intent to deceive the Commission. We continue to believe that the rule barring such intentional deceptions, whether by affirmative misstatements or by omissions of material facts, should apply, in appropriate contexts, to both oral and written material statements of fact.

10. We are also persuaded that the rule should apply in written statements to

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<sup>4</sup> “Material” has been defined as “important,” “more or less necessary,” “having influence or effect.” See McDonald v. Murray, 515 P.2d 151, 152 (Wash. 1973). Additionally, a “material representation” has been defined as one “relating to matter which is so substantial or important as to influence the party to whom it is made.” See In the Matter of Mark E. Wagner, 744 N.E.2d 418, 421 (Ind. 2001).

representations made without having a reasonable basis to believe that they are correct and not misleading. This is the concept we intended to apply when we used the term “negligence.” We disagree with the **FCBA’s** contention that no other federal agency employs a negligence standard.<sup>5</sup> Nevertheless, because we believe the **FCBA’s** suggested standard is a clearer statement of the appropriate standard of care, we will adopt it instead. The rule will thus refer to material, factual information provided without a reasonable basis for believing it correct and not misleading.

11. We agree with the commenters that “reasonableness” depends on the circumstances; we do not intend to create arbitrary or unrealistic burdens on people making, for example, informal statements to the Commission, or giving “ball park figures.”<sup>6</sup> Moreover, we agree that it would be impractical to apply a negligence standard to oral statements, because of the difficulty in determining the degree of due diligence applicable to an oral statement.

12. We will therefore apply the reasonableness standard in applicable contexts, only to regulatees’ written statements. We believe that in preparing written statements in fact-based adjudications and investigations, regulatees are on heightened notice that they must have a reasonable basis to believe that what they say is correct and not misleading. In these circumstances, we consider it justified to require that parties use due diligence in providing information that is correct and not misleading to the Commission, including taking appropriate affirmative steps to determine the truthfulness of what is being submitted. A failure to exercise such reasonable diligence would mean that the party did not have a reasonable basis for believing in the truthfulness of the information. We will modify the proposed rule accordingly.

13. In defining the proceedings to which the rule applies, we see no need at this time to apply any aspect of rule 1.17 to comments in rulemaking proceedings (other than proceedings to amend the **FM** or Television Table of Allotments and tariff proceedings) or declaratory ruling proceedings. The primary focus of our proposal was to enhance the effectiveness of adjudicatory and investigatory proceedings by providing for an expanded range of sanctions that can be imposed in those contexts. We do not see rulemakings of general applicability and declaratory rulings as raising enforcement issues of the same urgency. Additionally, while we expect parties to be truthful in rulemakings and declaratory ruling proceedings, we are mindful that such proceedings typically involve wide-ranging discussions of general policy rather than specific facts to be weighed in an adjudicatory manner. We do not wish to hinder **full** and robust public

<sup>5</sup> Relevant provisions include: 10 C.F.R. § 820.11 (Information regarding a nuclear activity provided to DOE must be complete and accurate in all material respects. Enforcement guidelines indicate that negligent violations are punishable); 26 C.F.R. § 1.1609-1T (Negligent material misstatements with respect to the issuance of a mortgage credit certificate subject to a \$1000 fine); 19 C.F.R. Pt. 171 **App. B** (Introduction of **goods** into commerce through fraud, gross negligence, or negligence by means of material false information or omission is violation); 19 C.F.R. Pt. 171 **App. D** (Similar provision regarding the false or **negligent** payment of drawback **claims**); 21 U.S.C. § 842 (Negligent failure to keep records or **make** reports required by § 830 concerning controlled substances is unlawful).

<sup>6</sup> Moreover, we agree with the commenters that the institution of prompt voluntary corrective measures prior to discovery by the Commission may mitigate the seriousness of a violation.

participation in such policymaking proceedings by encouraging collateral wrangling over the truthfulness of the parties' statements. Expressions of interest in proceedings to amend the FM or Television Table of Allotments,<sup>7</sup> and tariff proceedings raise concerns that are distinguishable from those in rulemakings generally and will be subject to the rule. Therefore we will limit the applicability of rule 1.17 to investigatory, adjudicatory (except declaratory ruling), expressions of interest in proceedings to amend the FM or Television Table of Allotments, and tariff proceedings.

### C. PERSONS TO WHOM THE RULE APPLIES

14. As an additional matter, some of the comments questioned the applicability of the rule to nonregulatees, attorneys, and engineers. Minority Media asserts that the rule should not be applicable to persons who are not Commission regulatees, and specifically to members of the public who file complaints or otherwise provide information to the Commission while not under oath. According to Minority Media, the participation by such "whistleblowers" in the Commission's processes would be unduly chilled if they feared that their inadvertent misstatements might be penalized. OPUC, Verizon, and Kay agree with Minority Media that section 1.17 should not be applied to persons who are not Commission regulatees.

15. The FCBA urges that section 1.17 should not apply directly to attorneys. According to the FCBA, doing so would potentially interfere with the attorney-client relationship by giving the attorney an incentive to disregard the client's wishes to protect the attorney. The FCBA maintains that existing ethical rules adequately address possible misconduct by attorneys. AFCCE contends that engineers as well as attorneys should not be subject to section 1.17. AFCCE offers several examples in which engineers proffering information in good faith might be penalized by the proposed language.

16. As indicated above, the primary focus of our proposal was to enhance the effectiveness of investigatory and adjudicatory proceedings. Accordingly, the rule focuses appropriately on persons subject to the Commission's regulatory jurisdiction as defined by the five categories in the rule. We do not at this time see a need to apply the rule to nonregulatees who have occasion to communicate with the Commission. Of course, as noted in the current rule, false statements by nonregulatees may be subject to the criminal provisions of 18 U.S.C. § 1001.

17. This approach moots FCBA's concern that applying section 1.17 of the rules directly to attorneys may potentially conflict with the ethical responsibilities inherent in the attorney-client relationship. The rule applies to the regulated entity at issue. Thus, for example, if a

<sup>7</sup> Expressions of interest in these proceedings are specifically made subject to truthfulness requirements by 47 C.F.R. § 73.1015. As a clerical matter, we will amend 47 C.F.R. §§ 73.1015 and 76.939 to conform to our action here. As the FCBA points out in its comments, section 73.1015 is the counterpart of section 1.17 applicable specifically to the broadcast service. FCBA Comments at 12 n.18. Section 76.939 applies specifically to cable operators. We see no purpose in having multiple sections contain redundant provisions. Accordingly, we will amend sections 73.1015 and 76.939 to cross reference section 1.17.

broadcast licensee submits an application or affidavit signed by an attorney or engineer in support of its application, and it turns out that the attorney or engineer employee intentionally provided incorrect information, it is the regulatee that will have violated the rule, not the attorney or engineer. Thus, the rule, by design and in light of its purpose, does not cover attorney *or* engineers in their representational capacity, but rather only the extent that they themselves are the regulated entity.<sup>8</sup>

#### D. ADDITIONAL MATTER

18. Finally, our revision of the rule makes unnecessary the language contained in the first subparagraph of the rule. The authority of the Commission to obtain information is set forth in various statutory provisions, for example, 47 U.S.C. §§ 218, 308(b), 403, and does not need to be reiterated in the rule.

### III. PETITION FOR RULEMAKING

19. We take this opportunity to dispose of an additional matter. Kay attaches to his comments a copy of a petition for rulemaking filed March 5, 2002. In his petition, Kay proposes several modifications to the Commission's investigatory and hearing procedures. We have examined Kay's proposals and find them without merit. Several of Kay's proposals would unduly burden the Commission's investigatory and hearing functions.<sup>9</sup> Other matters are already adequately addressed by existing law and policy. We will therefore deny the petition.

### IV. PROCEDURAL MATTERS

#### Regulatory Flexibility Certification

20. The Regulatory Flexibility Act of 1980, as amended (see 5 U.S.C. § 601 et seq.)<sup>10</sup> requires a final regulatory flexibility analysis in a notice and comment rulemaking proceeding unless we certify that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). We believe that the rule we adopt today

<sup>8</sup> We note that the Commission's rules provide special procedures to deal with allegations of attorney misconduct. See 47 C.F.R. § 1.24(d).

<sup>9</sup> Kay proposes to: (1) prohibit confidential complaints, (2) make compliance with section 308(b) of the Communications Act voluntary and subject to immediate Commission and judicial review, (3) require service of a bill of particulars before issuance of a hearing designation order, (4) separate regulatory and investigatory functions at the bureau level, and (5) bar bureaus from participating in the consideration of applications for review.

<sup>10</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. R47 (1996) (CWMA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).



will not have a significant economic impact on a substantial number of small entities

21. In expanding the scope of 47 C.F.R. § 1.17, we are merely requiring persons subject to the Commission's regulatory jurisdiction to submit information that is correct and not misleading. The proposed revised rule thus would not impose any significant compliance burden on persons dealing with the Commission, including small entities, or otherwise affect the rights of persons participating in Commission proceedings. The revised rule would simply enable the Commission to impose sanctions more effectively in those instances where people intentionally or negligently submit incorrect or misleading information. There is thus no reason to believe that operation of the revised rule would impose significant costs on parties to Commission proceedings.

22. Accordingly, we certify that the rule as proposed will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b). The Commission shall send a copy of this Report and Order, including this certification, to the Chief Counsel for Advocacy of the SBA. 5 U.S.C. § 605(b). A copy of this certification will also be published in the Federal Register. *Id.*

#### **Authority**

23. Authority for this rulemaking is contained in 47 U.S.C. §§ 154(i), 154(j), 201(b), and 303(r).

### **V. ORDERING CLAUSES**

24. ACCORDINGLY, IT IS ORDERED, That 47 C.F.R. §§ 1.17, 73.1015, and 76.939 ARE AMENDED as set forth in the attached Appendix effective upon publication in the Federal Register.

25. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

26. IT IS FURTHER ORDERED that the Petition for Rulemaking, filed March 5, 2002, by James A. Kay, Jr. IS DENIED.

27. For further information, contact David S. Senzel, (202) 418-1720, Office of General Counsel.

### **FEDERAL COMMUNICATIONS COMMISSION**

Marlene H. Dortch  
Secretary

## APPENDIX

### 1.17 Truthful and accurate statements to the Commission

(a) In any investigatory or adjudicatory matter within the Commission's jurisdiction (including, but not limited to, any informal adjudication or informal investigation but excluding any declaratory ruling proceeding) and in any proceeding to amend the FM or Television Table of Allotments (with respect to expressions of interest) or any tariff proceeding, no person subject to this rule shall

(1) in any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

(2) in any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.

(b) For purpose of paragraph (a), "persons subject to this rule" shall mean the following:

(1) any applicant for any Commission authorization;

(2) any holder of any Commission authorization, whether by application or by blanket authorization or other rule;

(3) any person performing without Commission authorization an activity that requires Commission authorization;

(4) any person that has received a citation or a letter of inquiry from the Commission or its staff, or is otherwise the subject of a Commission or staff investigation, including an informal investigation;

(5) in a proceeding to amend the FM or Television Table of Allotments, any person filing an expression of interest; and

(6) to the extent not already covered above, any cable operator or common carrier.

**73.1015 Truthful written statement<sup>3</sup> and responses to Commission inquiries and correspondence**

The Commission or its representatives may, in writing, require from any applicant, permittee, or licensee written statements of fact relevant to a determination whether an application should be granted or denied, or to a determination whether a license should be revoked, or to any other matter within the jurisdiction of the Commission, or, in the case of a proceeding to amend the FM or Television Table of Allotments, require from any person filing an expression of interest, written statements of fact relevant to that allotment proceeding. Any such statements of fact are subject to the provisions of 1.17 of Part 1 of these rules.

**76.939 Truthful written statements and responses to requests of franchising authority**

Cable operators shall comply with franchising authorities' and the Commission's requests for information, orders, and decisions. Any information submitted to a franchising authority or the Commission in making a rate determination pursuant to an FCC Form 393 (and/or FCC Forms 1200/1205) filing or a cost-of-service showing is subject to the provisions of 1.17 of ~~Part I~~ of these rules.